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Muhammad Nur Aizzat bin Mohd Yunos v Amir Hamzah bin Abd Razak & Anor (Pacific & Orient Insurance Co Bhd, intervener)

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HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO JA-12B-33–03 OF 2020
EVROL MARIETTE PETERS JC
20 JUNE 2021

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Tort — Road accident — Liability — Plaintiff and first defendant involved in road accident — Parties submitted two different versions of accident — Plaintiff and first defendant submitted first version of accident and second defendant submitted second version of accident — Sessions court judge accepted second version of accident — Whether witnesses were assessed and evaluated accordingly — Whether statutory declarations of second defendant's witnesses should have been excluded pursuant to s 73A(3) of the Evidence Act 1950 — Whether second version should have been excluded pursuant to s 153 of the Evidence Act 1950 — Whether fraud was established to exclude liability of insurer of vehicle — Whether insurer of vehicle liable pursuant to s 91 of the Road Transport Act 1987 — Whether plaintiff proved his case — Whether learned sessions court judge had erred in directing sum to be deposited with Amanah Raya Bhd — Evidence Act 1950 ss 73A(3), (5), 101 & 153 — Road Transport Act 1987 s 91

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The present appeal emanated from the decision of the learned sessions court judge ('the SCJ') in dismissing the plaintiff's claim against the defendants for injuries sustained in a road accident involving the plaintiff who had ridden his motorcycle and the first defendant who had ridden the second defendant's motorcycle. At first, both the parties had the same version of the accident, that was, the first defendant was riding from the opposite direction of the plaintiff and had suddenly cut across the plaintiff's path to turn into the junction on the plaintiff's left. Both the plaintiff and first defendant maintained that the accident involved only the two motorcycles and had occurred opposite a mosque ('the first version'). However, based on an investigation conducted by the insurance company that insured the second defendant's motorcycle ('the intervener'), the intervener found that fraud had been perpetrated by the plaintiff and the first defendant whereby the first version of the accident was a fabrication to enable the plaintiff to make claim against the intervener. Consequently, the second defendant decided to amend his defence with a different version of story, that was, the first defendant had ridden the motorcycle without his consent, and that the accident had occurred at a bridge, near the toll gate, which was between 500 and 800 metres away from the

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location indicated in the first version. The second defendant also argued that there was, in fact, a third vehicle involved in the accident, namely a motorcycle ridden by SD4, and that both the plaintiff and SD4 had collided into the first defendant, one after the other, unlike what was claimed in the first version ('the second version'). The second version was supported by the testimonies and statutory declarations from SD3, SD4 and SD5. At the end of the case, the learned SCJ accepted the second version and dismissed the plaintiff's claim, hence, the present appeal. The issues arose in the present appeal were: (a) whether witnesses were assessed and evaluated accordingly; (b) whether statutory declarations should have been excluded pursuant to s 73A(3) of the Evidence Act 1950 ('the EA'); (c) whether the second version should have been excluded pursuant to s 153 of the EA; (d) whether fraud was established to exclude liability of the intervener; (e) whether the intervener was liable pursuant to s 91 of the Road Transport Act 1987; (f) whether the plaintiff had proved his case; and (g) whether the learned SCJ had erred in directing sum to be deposited with Amanah Raya Bhd.

Held, dismissing the appeal with costs:

(1) In order to arrive at a decision according to law, a trier of fact must apply the standard of proof required by the law and judicially appreciate the evidence led before him. In the present case, the learned SCJ had not erred in disregarding the first version because there were more discrepancies in the evidence of the plaintiff and first defendant. Their evidence regarding the location of the accident, and the number of vehicles involved, was contradicted by the independent evidence of SD4 who was supported by SD3 and SD5 and this evidence was not challenged by the plaintiff. Further, although the investigating officer ('SP1') had issued a summons to the first defendant in accordance with the first version, the learned SCJ was correct in his finding that the investigations of SP1 could not be relied on, as it was inaccurate and incomplete as the second version was not considered in his investigations. The learned SCJ had considered whose version was more inherently probable when he concluded that the plaintiff had failed to prove his case. It was crucial to remember that the learned SCJ had heard and seen the witnesses in this case. He weighed and evaluated all evidence by the witnesses, including their credibility (see paras 11, 13–14 & 16).

(2) Bearing in mind that SD3, SD4, and SD5 were witnesses, and not litigants to the proceedings, the court found that the plaintiff had failed to establish that they were interested persons. As such, reliance on s 73A(3) of the EA was misconceived. At this juncture, it was also important to take note that the court may draw any reasonable inference from the form or contents of the statutory declarations, pursuant to s 73A(5) of the EA (see para 25).

(3) In the present case, the second version was the whole basis of the second defendant's case. It was not adduced for the sole purpose of injuring the character of the plaintiff, or the first defendant, or anyone for that matter. As such, s 153 of the EA had no application whatsoever (see para 31).

(4) The learned SCJ was correct in finding that there was suppression of material facts by both the plaintiff and first defendant, to render the first defendant fully liable, to enable the plaintiff to receive the maximum benefit from the insurance coverage, as the plaintiff was the one with the motive to benefit due to the severity of his injuries. The notes of evidence also indicated that both the plaintiff and first defendant had failed to challenge the second version, and as such, this must necessarily amount to acceptance. The court, therefore, found no reason to disturb this finding of fact by the learned SCJ, based on such inferences, since concealment of the truth would also amount to fraud. As such, the intervener could not be liable in light of such fraudulent claim (see para 39).

(5) It was undisputed that the first defendant was not specified in the insurance policy, and as such, in adherence to the terms of the same, the first defendant could not make a third-party claim with regard to the insurance coverage. In addition, the first defendant was neither authorised, nor requested to ride the motorcycle, and he was definitely not preforming any task or duty delegated to him by the second defendant. As such, there was no appealable error made by the learned SCJ on the liability of the intervener (see paras 41 & 44).

(6) It was trite law that the plaintiff had the legal burden of proof, as prescribed by s 101 of the EA and the standard of proof on the plaintiff to prove his claim was on a balance of probabilities. In light of the numerous discrepancies in the evidence of both the plaintiff and first defendant, in particular the issues pertaining to the location of the accident, the manner in which it had occurred, and the parties involved, the learned SCJ was not wrong in concluding that the plaintiff had not reached the threshold of proof on a balance of probabilities (see paras 45, 48 & 50).

(7) The court was of the view that the learned SCJ assessed damages on the basis that in the event the appeal was allowed, that the matter need not be remitted to the sessions court for assessment of damages. Secondly, it was crucial to note that the issue of depositing the sum of RM317,700.33 with Amanah Raya Bhd was discussed in chambers amongst the parties and the learned SCJ, and hence no reasons were provided by the learned SCJ for issuing such direction. Therefore, it was inequitable for the plaintiff to raise such issue at this stage (see paras 52–53).

[Bahasa Malaysia summary

Rayuan ini tercetus daripada keputusan hakim mahkamah sesyen yang bijaksana ('HMS') yang menolak tuntutan plaintif terhadap defendan-defendan bagi kecederaan yang dialami dalam kemalangan jalan raya yang melibatkan plaintif yang menunggang motosikalnya dan defendan pertama yang menunggang motosikal milik defendan kedua. Pada mulanya, kedua-dua pihak mempunyai versi kemalangan yang sama, iaitu, defendan pertama menunggang dari arah bertentangan plaintif dan tiba-tiba memotong laluan plaintif untuk membelok ke simpang di sebelah kiri plaintif. Kedua-dua plaintif dan defendan pertama menegaskan bahawa kemalangan tersebut hanya melibatkan dua motosikal dan telah berlaku bertentangan dengan sebuah masjid ('versi pertama'). Bagaimanapun, berdasarkan siasatan yang dijalankan oleh syarikat insurans yang menginsuranskan motosikal defendan kedua ('pencelah'), pencelah mendapati bahawa penipuan telah dilakukan oleh plaintif dan defendan pertama di mana versi pertama kemalangan tersebut adalah rekaan untuk membolehkan plaintif membuat tuntutan terhadap pencelah. Oleh itu, defendan kedua memutuskan untuk meminda pembelaannya dengan versi cerita yang berbeza, iaitu defendan pertama telah menunggang motosikal tanpa persetujuannya, dan kemalangan tersebut telah berlaku di sebuah jambatan, berhampiran pagar tol, iaitu antara 500 dan 800 meter dari lokasi yang ditunjukkan dalam versi pertama. Defendan kedua juga berhujah bahawa sebenarnya terdapat kenderaan ketiga yang terlibat dalam kemalangan tersebut, iaitu motosikal yang ditunggang SD4, dan kedua-dua plaintif dan SD4 telah bertembung dengan defendan pertama, satu demi satu, tidak seperti yang didakwa dalam versi pertama ('versi kedua'). Versi kedua disokong oleh keterangan dan akuan berkanun daripada SD3, SD4 dan SD5. Pada akhir kes, HMS yang bijaksana menerima versi kedua dan menolak tuntutan plaintif, justeru, rayuan semasa. Isu-isu yang timbul dalam rayuan ini adalah: (a) sama ada saksi-saksi dinilai dan diteliti dengan sewajarnya; (b) sama ada akuan berkanun tersebut sepatutnya dikecualikan menurut s 73A(3) Akta Keterangan 1950 ('AK'); (c) sama ada versi kedua sepatutnya dikecualikan menurut s 153 AK; (d) sama ada penipuan telah dibuktikan untuk mengecualikan liabiliti pencelah; (e) sama ada pencelah bertanggungjawab menurut s 91 Akta Pengangkutan Jalan 1987; (f) sama ada plaintif telah membuktikan kesnya; dan (g) sama ada HMS yang bijaksana telah terkhilaf apabila mengarahkan agar sejumlah wang didepositkan dengan Amanah Raya Bhd.

Diputuskan, menolak rayuan dengan kos:

(1) Untuk mencapai keputusan mengikut undang-undang, hakim mahkamah bicara perlu menggunakan standard pembuktian yang diperlukan oleh undang-undang dan menghargai secara kehakiman keterangan yang dikemukakan di hadapannya. Dalam kes ini, HMS yang bijaksana tidak terkhilaf dalam mengabaikan versi pertama kerana

terdapat lebih banyak percanggahan dalam keterangan plaintif dan defendan pertama. Keterangan mereka berhubung lokasi kemalangan, dan bilangan kenderaan yang terlibat, telah bercanggah dengan keterangan bebas SD4 yang disokong oleh SD3 dan SD5 dan keterangan ini tidak dicabar oleh plaintif. Tambahan pula, walaupun pegawai penyiasat ('SP1') telah mengeluarkan saman kepada defendan pertama mengikut versi pertama, HMS yang bijaksana adalah betul dalam dapatannya bahawa penyiasatan SP1 tidak boleh dipercayai, kerana ia tidak tepat dan tidak lengkap kerana versi kedua tidak dipertimbangkan dalam siasatannya. Hakim mahkamah sesyen yang bijaksana telah mempertimbangkan versi mana yang lebih berkemungkinan apabila dia membuat kesimpulan bahawa plaintif telah gagal membuktikan kesnya. Adalah penting untuk diingat bahawa HMS yang bijaksana telah mendengar dan melihat saksi-saksi dalam kes ini. Beliau telah menimbang dan menilai semua keterangan oleh saksi-saksi, termasuk kredibiliti mereka (lihat perenggan 11, 13–14 & 16).

(2) Mengambil kira bahawa SD3, SD4, dan SD5 adalah saksi, dan bukan litigan kepada prosiding, mahkamah mendapati bahawa plaintif telah gagal untuk membuktikan bahawa mereka adalah orang yang berkepentingan. Oleh itu, pergantungan pada s 73A(3) AK adalah salah tanggap. Pada peringkat ini, adalah penting juga untuk mengambil perhatian bahawa mahkamah boleh membuat apa-apa kesimpulan yang munasabah daripada bentuk atau kandungan akuan berkanun, menurut s 73A(5) AK (lihat perenggan 25).

(3) Dalam kes ini, versi kedua adalah asas keseluruhan kes defendan kedua. Ia tidak dikemukakan untuk tujuan semata-mata untuk memburukkan watak plaintif, atau defendan pertama, atau sesiapa sahaja dalam perkara tersebut. Oleh itu, s 153 AK tidak terpakai langsung (lihat perenggan 31).

(4) Hakim mahkamah sesyen yang bijaksana adalah betul dalam mendapati bahawa terdapat penyembunyian fakta material oleh kedua-dua plaintif dan defendan pertama, untuk menjadikan defendan pertama bertanggungjawab sepenuhnya, untuk membolehkan plaintif menerima manfaat maksimum daripada perlindungan insurans, kerana plaintif yang mempunyai motif untuk mendapat manfaat kerana keterukan kecederaannya. Nota keterangan juga menunjukkan bahawa kedua-dua plaintif dan defendan pertama telah gagal untuk mencabar versi kedua, dan oleh itu, ini semestinya terjumlah kepada penerimaan. Oleh itu, mahkamah mendapati tiada sebab untuk mengganggu dapatan fakta oleh HMS yang bijaksana ini, berdasarkan kesimpulan sedemikian, kerana penyembunyian kebenaran juga terjumlah kepada penipuan. Oleh itu, pencelah tidak boleh bertanggungjawab berdasarkan tuntutan penipuan tersebut (lihat perenggan 39).

(5) Tidak dapat dipertikaikan bahawa defendan pertama tidak dinyatakan dalam polisi insurans tersebut, dan oleh itu, dalam mematuhi terma tersebut, defendan pertama tidak boleh membuat tuntutan pihak ketiga berkenaan dengan perlindungan insurans tersebut. Di samping itu, defendan pertama tidak dibenarkan, mahupun diminta untuk menunggang motosikal tersebut, dan dia pastinya tidak melaksanakan apa-apa tugas atau kewajipan yang diwakilkan kepadanya oleh defendan kedua. Oleh itu, tiada kekhilafan yang boleh dirayu yang dilakukan oleh HMS yang bijaksana mengenai liabiliti pencelah (lihat perenggan 41 & 44).

(6) Adalah menjadi undang-undang yang mantap bahawa plaintif mempunyai beban pembuktian undang-undang, seperti yang ditetapkan oleh s 101 AK dan standard pembuktian pada plaintif untuk membuktikan tuntutannya adalah pada imbangan kebarangkalian. Memandangkan banyak percanggahan dalam keterangan kedua-dua plaintif dan defendan pertama, khususnya isu yang berkaitan dengan lokasi kemalangan, cara ia berlaku, dan pihak yang terlibat, HMS yang bijaksana tidak salah dalam membuat kesimpulan bahawa plaintif tidak mencapai ambang pembuktian pada imbangan kebarangkalian (lihat perenggan 45, 48 & 50).

(7) Mahkamah berpendapat bahawa HMS yang bijaksana menilai ganti rugi atas dasar sekiranya rayuan dibenarkan, perkara tersebut tidak perlu diserahkan kepada mahkamah sesyen untuk penilaian ganti rugi. Kedua, adalah penting untuk diambil perhatian bahawa isu mendepositkan sejumlah RM317,700.33 dengan Amanah Raya Bhd telah dibincangkan dalam kamar di kalangan pihak-pihak dan HMS yang bijakasana, dan oleh itu tiada alasan diberikan oleh HMS yang bijaksana untuk mengeluarkan arahan tersebut. Oleh itu, adalah tidak adil bagi plaintif untuk membangkitkan isu sedemikian pada peringkat ini (lihat perenggan 52–53).]

Cases referred to

Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor [1997] 2 MLJ 775; [1997] 3 CLJ 181, CA (refd)

Allied Bank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1; [1998] 2 CLJ 33, HC (refd)

B (Children), Re [2008] 4 All ER 1; [2008] UKHL 35, HL (refd)

Bhojraj v Sitaram AIR 1936 PC 60, PC (refd)

Bong Nyi Moi v Narayanasamy & Anor [1973] 1 MLJ 250, FC (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Chong Keow v Shaari Yaacob [1988] 1 CLJ Rep 463, HC (refd)

Dadourian Group International Inc and others v Simms and others [2009] EWCA Civ 169, CA (refd)
Derry v Peek (1889) 14 App Cas 337, HL (refd)
Hong Yik Trading v Liziz Plantation Sdn Bhd [2017] 5 MLJ 398; [2017] 8 CLJ 491, FC (refd)
Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (refd)
Jegathees Nagulan & Ors v Suresh Balakrishnan & Anor [2016] 6 CLJ 253, HC (refd)
Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119; [1974] 1 LNS 61, FC (refd)
Kesavaram Velasamy v Chong Kian Heng [2013] 1 LNS 102, CA (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Mohamed bin Kasdi v PP [1969] 1 MLJ 135; [1968] 1 LNS 78 (folld)
Multar v Lim Kim Chet & Anor [1982] 1 MLJ 184; [1982] CLJ Rep 237, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 CLJ 215, HC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1 (refd)
Tokio Marine Insurance (M) Sdn Bhd v Rathakrisnan a/l Ramatasu & Anor and another appeal [2017] 1 MLJ 779; [2017] 3 CLJ 678, CA (distd)
Unsung bin Rasad v PP [2019] 4 MLJ 448; [2019] 1 LNS 662, CA (folld)
Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175; [1971] 1 LNS 151, FC (refd)
Woon Ngee Yew and others v Ng Yoon Thai and others [1941] 1 MLJ 37; [1940] 1 LNS 119 (refd)
Yahaya bin Mohamad v Chin Tuan Nam [1975] 2 MLJ 117; [1975] 1 LNS 195, PC (refd)
Yee Poh Nyen v Raji bin Kasan & Ors [2018] MLJU 1108, CA (refd)

Legislation referred to

Evidence Act 1950 ss 73A, 73A(3), (5), 101, 134, 153
Road Transport Act 1987 s 91

R Jayabalan (Kamarudin & Partners) for the plaintiff.
SK Lee (SK Lee) for the second defendant.
RK Nathan (Vinod Kamalanathan with him) (Vinod Kamalanathan & Assoc) for the intervener.

Evrol Mariette Peters JC:

INTRODUCTION

[1] This was the appellant's appeal ('this appeal') against the decision of the learned sessions court judge ('SCJ') dated 8 March 2020, on the issue of liability. For ease of reference, the appellant and respondents will be referred to respectively as the plaintiff and defendants.

The background facts

[2] The plaintiff's claim against the defendants was for injuries sustained in a road accident on 23 March 2017 at approximately 12.30am, between him, as the rider of motorcycle bearing registration number No ACM3009, and the first defendant, as the rider of motorcycle bearing registration number No JBG4669, which was owned by the second defendant.

[3] The proceedings were such that the version provided by both the plaintiff and first defendant was the same ('the first version'), that is, the first defendant was riding from the opposite direction of the plaintiff and had suddenly, without any warning whatsoever, cut across the plaintiff's path to turn into the junction on the plaintiff's left. Both the plaintiff and first defendant maintained that the accident involved only the two motorcycles, and had occurred opposite the mosque, as shown in the sketch plan.

[4] After the plaintiff had closed his case, the insurance company ('the intervener') that insured the second defendant's motorcycle, applied to intervene on the basis that pursuant to investigations conducted, it discovered that fraud had been perpetrated by both the plaintiff and first defendant, and that the first version was a fabrication to enable the plaintiff to make a claim against the intervener.

[5] The solicitors for the defendants, then discharged themselves from representing the first defendant only, and proceeded to make an application to amend the second defendant's defence, and provided a different account of how the accident had occurred ('the second version') where he had pleaded, inter alia, that the first defendant had ridden the motorcycle without his consent, and that the accident had occurred at a bridge, near the toll gate, which was between 500 and 800 metres away from the location indicated in the first version. The second defendant further averred that there was, in fact, a third vehicle involved in the accident, namely a motorcycle ridden by one Muhammad Ariff Farhan bin Razali ('SD4'), and that both the plaintiff and SD4 had collided into the first defendant, one after the other, unlike what was claimed in the first version.

[6] The learned SCJ accepted the second version and dismissed the plaintiff's claim. Hence, this appeal by the plaintiff, which was dismissed for the following reasons.

[7] As a general rule, an appellate court begins on the basis that any decision appealed against is correct in every respect. Therefore, to succeed in an appeal, the plaintiff in this case must convince this court that the decision appealed against is wrong; and if this court is not so convinced, the appeal should fail.

[8] This is because the findings of the learned SCJ who had the advantage of seeing, hearing, assessing and evaluating the witnesses, must be respected: *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117; [1975] 1 LNS 195. An appellate court, therefore, should be cautious in upsetting the findings of the trial judge.

[9] However, this does not, in any way, mean that the hands of the appellate court are tied. The exception to the general rule mentioned above is when the findings are clearly wrong: *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; or where crucial evidence has been misconstrued, or disregarded: *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184; [1982] CLJ Rep 237; or if the trial judge is shown to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason, or to have drawn an inference from evidence which was equally capable of supporting a different inference, it then may be the duty of an appellate court to interfere: *Woon Ngee Yew and others v Ng Yoon Thai and others* [1941] 1 MLJ 37; [1940] 1 LNS 119.

CONTENTIONS, EVALUATION, AND FINDINGS

[10] The gist of the plaintiff's contention in this appeal was whose version of the accident should have been accepted. In light of the conflicting versions, the issue in the forefront was whether there was judicial appreciation of evidence by the learned SCJ, and whether he had erred in failing to take into account discrepancies that the plaintiff claimed existed in the evidence of the second defendant's witnesses. The proceedings, therefore, were highly fact-sensitive.

Whether witnesses were assessed and evaluated accordingly

[11] It is trite that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived at in the absence of a judicial appreciation of evidence is liable to appellate correction. 'Judicial appreciation is concerned with the process of

evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case, and assessing the demeanour of witnesses': per Gopal Sri Ram JCA (as he then was) in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62.

[12] 'The real tests for either accepting, or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits with the rest of the evidence and the circumstances of the case': *Bhojraj v Sitaram* AIR 1936 PC 60. I also found instructive the following words of Ali J in *Mohamed bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135; [1968] 1 LNS 78:

> No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, *but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness.* (Emphasis added.)

[13] In his contention that the learned SCJ had failed to judicially appreciate the evidence, and therefore erred in accepting the second version, counsel for the plaintiff had painstakingly taken the court through the minute details of the account of that fateful night. However, in my view, the learned SCJ had not erred in disregarding the first version, since there were more discrepancies in the evidence of the plaintiff and first defendant. Their evidence regarding the location of the accident, and the number of vehicles involved, was contradicted by SD4 who was supported by SD3 and SD5. These witnesses were all in the company of the first defendant before he rode off on the second defendant's motorcycle which was in the possession of SD3, who had reached the scene of the accident shortly after it had occurred.

[14] The plaintiff merely denied the second version and the involvement of SD4 in the accident. However, the first version contradicted the independent evidence provided by the second defendant's witnesses, as well as the medical report pertaining to the injuries sustained by SD4, which was not challenged by the plaintiff. It was crucial to note that although the investigating officer ('SP1') had issued a summons to the first defendant in accordance with the first version, the learned SCJ was correct in his finding that the investigations of SP1 could not be relied on, as it was inaccurate and incomplete as the second version was considered in his investigations.

[15] Since the gist of the plaintiff's contention was that the learned SCJ had relied on the version that was inaccurate, it was apt to refer to the case of *Chong Keow v Shaari Yaacob* [1988] 1 CLJ Rep 463, where it was explained by Lim

Beng Choon J in the following passage:

> The existence of two conflicting versions of how an accident occurred (as it happens here) is typical in almost all motor vehicle accident cases. In such a situation, I will have to carry out a searching evaluation and assessment of the totality of the oral evidence and also to resort to the documentary evidence in order to find out the truth. In my attempt to uncover the truth in order to arrive at a just decision, I must not lose sight of the principle that in assessing the evidence of the parties in a suit, *it is not merely a question of whom to believe but rather whose version is more inherently probable which is the prime consideration*. (Emphasis added.)

[16] In the present case, the learned SCJ had considered whose version was more inherently probable when he concluded that the plaintiff had failed to prove his case. It is crucial to remember that the learned SCJ had heard and seen the witnesses in this case. He weighed and evaluated all evidence by the witnesses, including their credibility. This observation is found in the case of *Bong Nyi Moi v Narayanasamy & Anor* [1973] 1 MLJ 250, where it was stated by the Federal Court, through Ali FCJ, as follows:

> Here lies the difficulty in this appeal. The learned trial judge had seen and heard the witnesses and was not satisfied with his evidence. He gave his reason for not being so satisfied. Speaking for myself, I must say I cannot quarrel with this reason. Indeed, I do not think I should.

[17] The plaintiff suggested that the witnesses had all conspired to support the second version, especially since the second defendant's narrative had only emerged later.

[18] I was unable to agree with the plaintiff simply because there was no evidence to suggest that SD3, SD4 and SD5 were in cahoots to buttress the second defendant's case. It was also difficult to believe that there was a conspiracy amongst SD3, SD4 and SD5, bearing in mind that they were all friends with the first defendant and were from the same *kampong*, and it was, therefore, inconceivable that they would deliberately hatch a plan to contradict the first defendant and prevent the plaintiff from benefitting from the insurance coverage.

[19] I am mindful of s 134 of the Evidence Act which states that 'no particular number of witnesses shall in any case be required for the proof of any fact'. However, in this case, the evidence of SD4, was in fact corroborated by SD3 and SD5. Discrepancies in the evidence of SD4, if at all, were minor, and on the whole, he was convincing in his evidence, as found by the learned SCJ. Furthermore, it was crucial to bear in mind that a perusal of the notes of evidence indicated that both the plaintiff and first defendant, although had ample opportunity to challenge the second version, had failed to do so, and in light of that, there was no error on the part of the learned SCJ in concluding

that the second version was the accurate one.

[20] Much had been said about the fact that SD4's account of the accident, which formed the basis of the second version, had emerged at a very much later stage, and therefore, should be viewed with circumspect.

[21] In my view, SD4 had had explained the delay in providing the second version, which was accepted by the learned SCJ, wherein he had clarified that both the plaintiff and first defendant had offered to settle the matter out of court, which SD4 had accepted. Hence, the absence of any police report by SD4 at the time of the accident.

[22] SD4's account had emerged later, pursuant to investigations conducted by the intervener, and as a result thereof, the second defendant had proceeded to amend his defence, whose application was allowed by the court. There was, therefore, no grounds for the court to view the second version with circumspect merely because it had emerged later.

Whether statutory declarations should have been excluded pursuant to s 73A(3) of the Evidence Act

[23] The plaintiff had also averred that the statutory declarations affirmed by the witnesses including SD3, SD4, and SD5 should not have been relied on, pursuant to s 73A(3) of the Evidence Act, as they were made by persons who had a vested interest in the proceedings. The provision reads:

> Section 73A — *Admissibility of documentary evidence in civil cases, etc*
>
> ...
>
> (3) Nothing in this section shall render admissible as evidence any statement *made by a person interested* at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.
>
> ... (Emphasis added.)

[24] A 'person interested' in the context of s 73A of the Evidence Act, was explained by Augustine Paul J (as he then was) in *Allied Bank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1; [1998] 2 CLJ 33, in the following passage:

> A person interested is someone who had a substantial material interest in the outcome of the proceedings pending or anticipated when the statement was made. This is the crucial occasion to determine the question of interest and not the time when the statement is tendered in evidence (see *Cartwright v Richardson (w) & Co Ltd* [1955] 1 All ER 742). In *Evon v Noble* [1949] 1 KB 222 Birkett J said that, in order that a person should come outside the category of those interested, he must be 'completely detached, judicial, impartial, independen't. Sholl J said in *Tobias v Allen (No 2)* [1957] VR 221 at p. 223:

> ... it is my opinion sufficient to constitute a disqualifying interest within the meaning of the sub-section if a person's conduct is likely to be called in question in the pending or anticipated litigation, or his interest is likely to be affected if, in short, anything is shown which is reasonably calculated to affect the impartiality of the person making the statement.

The judgment of the Court of Appeal in *Bearmans Ltd v Metropolition Police District Receiver* [1961] 1 All ER 304 leans strongly in favour of the view that there must be a real likelihood of bias before the maker of a statement can be said to be a person interested. The materiality must be substantial.

[25] Bearing in mind that SD3, SD4, and SD5 were witnesses, and not litigants to the proceedings, I found that the plaintiff had failed to establish that they were interested persons. As such, reliance on s 73A(3) of the Evidence Act was misconceived. At this juncture, it was also important to take note that the court may draw any reasonable inference from the form or contents of the statutory declarations, pursuant to s 73A(5) of the Evidence Act, which reads:

> Section 73A — *Admissibility of documentary evidence in civil cases, etc*
>
> (5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), *the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances,* and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted. (Emphasis added.)

[26] In any event, in my view, regardless of the statutory declarations, SD3, SD4 and SD5 had provided oral evidence in the sessions court, which the learned SCJ had assessed, evaluated, and relied on in concluding that the second version was more probable.

Whether second version should have been excluded pursuant to s 153 of the Evidence Act

[27] The plaintiff in relying on the Court of Appeal case of *Tokio Marine Insurance (M) Sdn Bhd v Rathakrisnan a/l Ramatasu & Anor and another appeal* [2017] 1 MLJ 779; [2017] 3 CLJ 678, argued further that the second version should not have been considered by the learned SCJ by virtue of s 153 of the Evidence Act, which the plaintiff had submitted at quite some length. The provision reads:

> Section 153 — *Exclusion of evidence to contradict answers to questions testing veracity*
>
> When a witness has been asked and has answered any question which is relevant to

A

> the inquiry *only so far as it tends to shake his credit by injuring his character*, no evidence shall be given to contradict him ... (Emphasis added.)

[28] I found the plaintiff's reliance on *Tokio Marine Insurance (M) Sdn Bhd v Rathakrisnan a/l Ramatasu & Anor and another appeal*, misconceived since in that case the second version of the defendant was disallowed because it was not pleaded.

B

[29] Secondly, it was crucial to note that s 153 of the Evidence Act applies in very specific circumstances, that is, where the evidence adduced is relevant, not to the fact in issue, but only so far as to injure the character of the witness in question. Once the witness has answered that question, only then will s 153 of the Evidence Act apply to prevent the adverse party from adducing contradictory evidence.

C

D

[30] Reference was made to *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215, where Augustine Paul J (as he then was), in addressing s 153 of the Evidence Act, explained that the object of this section is to confine the proceedings only to the facts in issue of the case.

E

[31] In the present case, the second version was the whole basis of the second defendant's case. It was not adduced for the sole purpose of injuring the character of the plaintiff, or the first defendant, or anyone for that matter. As such, s 153 of the Evidence Act had no application whatsoever.

F

Whether fraud was established to exclude liability of intervener

[32] In denying liability, the intervener had contended that based on its investigations and interviews with relevant witnesses, the plaintiff and first defendant had perpetrated fraud to enable the plaintiff to benefit from the first defendant's third party insurance claim pursuant to the insurance coverage on the motorcycle owned by the second defendant.

G

[33] In *Derry v Peek* (1889) 14 App Cas 337, Lord Herschell gave a succinct explanation of fraud, in the following passage:

H

> ... Second, fraud is proven when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no belief in the truth of what he states.

I

[34] The concept of fraud has always been a complex one to deal with. Although it is a generic term, under its umbrella are numerous examples which are impossible to enumerate. Fraud has been described to include all 'acts,

omissions, and concealments which involve a breach of a legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered fraud. Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to': per Jeffrey Tan FCJ in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697.

[35] The subsequent issue revolved around the method of establishing fraud. Bearing in mind the difficulty of obtaining direct evidence, it has been held that fraud may be established *via* circumstantial evidence. As was stated by Arden LJ in *Dadourian Group International Inc and others v Simms and others* [2009] EWCA Civ 169, if only direct evidence was admissible in establishing fraud, 'few allegations of fraud would ever come to trial. Fraudsters rarely sit down and reduce their dishonest agreement to writing'.

[36] This comment was approved by the Court of Appeal in *Yee Poh Nyen v Raji bin Kasan & Ors* [2018] MLJU 1108, where it was stated by Tengku Maimun JCA (as she then was) that the law does not require direct evidence, but recognises that fraud is commonly proved on the basis of inviting the fact-finder to draw proper inferences from primary facts:

> Fraud in actions seeking to affect a registered title means actual fraud or dishonesty of some sort and not what is called constructive or equitable fraud (see *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81). Whether fraud exist is a question of fact which is to be determined in the light of the facts and circumstances surrounding each particular case (see *PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 137; *Suratmin Othman v Yusof Omar & Ors* [1988] 2 CLJ Supp 380). Fraud may occur where the designed object of a transfer is to cheat a person of any existing right or where by a deliberate and dishonest act a person is deprived of his existing right (see *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196).

[37] It is also fundamental to note that the standard of proving fraud is now on a balance of probabilities, and not as high as that required in criminal cases, that is beyond a reasonable doubt: *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1. See also *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697.

[38] In this case, the learned SCJ had found that the first version was at such variance with the second version that it could not be reconciled. Both plaintiff and first defendant could not explain the discrepancies. Instead of challenging

the second version, both plaintiff and first defendant merely denied its truth, and averred that there was a conspiracy to prevent the plaintiff from benefitting from the insurance coverage.

[39] In my view, the learned SCJ was correct in finding that there was suppression of material facts by both the plaintiff and first defendant, to render the first defendant fully liable, to enable the plaintiff to receive the maximum benefit from the insurance coverage, as the plaintiff was the one with the motive to benefit due to the severity of his injuries. The notes of evidence also indicated that both plaintiff and first defendant had failed to challenge the second version, and as such, this must necessarily amount to acceptance. I, therefore, found no reason to disturb this finding of fact by the learned SCJ, based on such inferences, since concealment of the truth would also amount to fraud. As such, the intervener could not be liable in light of such fraudulent claim.

Whether intervener was liable pursuant to s 91 of the Road Transport Act

[40] The intervener had also contended that the first defendant had been riding the motorcycle without the consent of the second defendant, and pursuant to s 91 of the Road Transport Act 1987, the intervener was not liable. The provision reads:

> Section 91 — *Requirements in respect of policies*
>
> (1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —
>
> (a) is issued by a person who is an authorised insurer within the meaning of this Part; and
>
> (b) insures such person, *or class of persons as may be specified in the policy* in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:
>
> ... (Emphasis added.)

[41] It was undisputed that the first defendant was not specified in the insurance policy, and as such, in adherence to the terms of the same, the first defendant could not make a third party claim with regard to the insurance coverage. Furthermore, according to the finding of fact made by the learned SCJ, the motorcycle of the second defendant was borrowed by his nephew, SD3. The first defendant had taken the motorcycle and ridden off, without the consent of SD3. This version of how the first defendant ended up riding the second defendant's motorcycle was corroborated by the witnesses. The learned SCJ was, therefore, correct in concluding that the consent given by the second

defendant to SD3 could not be extended to the first defendant, which meant that the first defendant was riding the motorcycle without the consent of the second defendant.

[42] Even if consent was extended to the first defendant by virtue of it being given by the second defendant to SD3, the learned SCJ, in concluding that the intervener was not liable, was guided by the Court of Appeal cases of *Kesavaram Velasamy v Chong Kian Heng* [2013] 1 LNS 102 and *Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor* [1997] 2 MLJ 775; [1997] 3 CLJ 181. In *Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor* it was stated by Gopal Sri Ram JCA:

> The principle that the owner of a car is vicariously liable for the user of it by someone whom he has permitted to use it if he has an interest or concern in the purposes for which it is being used, is not only unsatisfactory but unwarranted. Every person who permits another to use his car may be said to have an interest or concern in the car being carefully used and in most cases to have an interest or concern in the safety of the driver but it has never been the law that mere permission is sufficient to establish vicarious liability. A person who permits another to use his car does not become the former's agent if on his own volition he uses it for the owner's benefit, eg, a person using his brother's car with permission does not become the latter's agent because, remembering that the latter has a luggage at the shop he uses the car to collect it. If the journey is at the owner's own request as in *Ormrod*'s case or where the owner asks his brother to bring the car to the railway station to meet him, then the driver can be said to do an act for the owner and acting as his agent. *The owner is liable because he has authorised or requested the act or because the driver is carrying out a task or duty delegated to him, or because he is in control of the driver's conduct. He is not liable just because he has given permission to use the car, and has an interest or concern in the purpose for which the car is being used.* The phrase *qui facit per alium, facit per se* correctly expresses the principle governing vicarious liability. (Emphasis added.)

[43] Reference was made also to *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119; [1974] 1 LNS 61.

[44] In the present case, the first defendant was neither authorised, nor requested to ride the motorcycle, and he was deifnitely not preforming any task or duty delegated to him by the second defendant. As such, there was no appeable error made by the learned SCJ on the liability of the intervener.

Whether the plaintiff had proved his case

[45] In the final analysis, this case pivoted on whether the plaintiff had proved his case. It is trite law that the plaintiff had the legal burden of proof, as prescribed by s 101 of the Evidence Act, which reads:

> Section 101 — *Burden of proof*

> Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[46] This reminder was administered by the Federal Court in *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175; [1971] 1 LNS 151 in the words of Ong CJ:

> In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence. Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself.

[47] It was further emphasised in the case of *Hong Yik Trading v Liziz Plantation Sdn Bhd* [2017] 5 MLJ 398; [2017] 8 CLJ 491, by Arifin Zakaria CJ, in the following passage:

> It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s 101 of the Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence.

[48] The standard of proof on the plaintiff to prove his claim was on a balance of probabilities. The term 'balance of probabilities' was described in *Miller v Minister of Pensions* [1947] 2 All ER 372 by Denning J (as he then was) as 'more probable than not' and which is 'not so high as required in a criminal case ... but if the probabilities are equal, it is not discharged'. The standard, therefore, does not allow for any guesswork, speculation, surmise or conjecture. *Miller v Minister of Pensions* has been assimilated into Malaysian jurisprudence through several cases including *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1.

[49] I found instructive also the case of *Unsung bin Rasad v Public Prosecutor* [2019] 4 MLJ 448; [2019] 1 LNS 662, where the concept of balance of probabilities was explained by Abang Iskandar Abang Hashim JCA (now CJSS), adopting the English case of *Re B (Children)* [2008] 4 All ER 1; [2008] UKHL 35:

> In the celebrated case of *Miller v Minister of Pensions* [1947] 2 All ER 372, Denning J (as he then was) said:
>
> > If the evidence is such that the tribunal can say 'we think it more probable than

not' the burden is discharged, but if the probabilities are equal it is not.

[17] That would invariably require that party involved having to lead or adduce affirmative evidence to prove his case, as the court shall presume the absence of those circumstances, *to reach a level of proof of at least 51% probability against his adverse party*. We would cite the English case of *Re B* [2008] UKHL 35, where Lord Hoffman had used a mathematical analogy to illustrate what needed to be proven by a party desirous of having judgement entered in his favour, like so:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. *If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.* (Emphasis added.)

[50] In light of the numerous discrepancies in the evidence of both the plaintiff and first defendant, in particular the issues pertaining to the location of the accident, the manner in which it had occurred, and the parties involved, the learned SCJ was not wrong in concluding that the plaintiff had not reached the threshold of proof on a balance of probabilities.

Whether learned SCJ had erred in directing sum to be deposited with Amanah Raya Bhd

[51] Although the learned SCJ had dismissed the plaintiff's claim, he had proceeded to assess damages, and directed that a sum of MYR317,700.33 from the total amount of MYR617,700.33 awarded, be deposited with Amanah Raya Bhd in the plaintiff's name, and to be withdrawn only for the purpose of buying the prosthesis if the need arose. The plaintiff raised this issue in the appeal, and contended on the authority of *Jegathees Nagulan & Ors v Suresh Balakrishnan & Anor* [2016] 6 CLJ 253, that the learned SCJ was *functus officio*, and did not have the authority to give such direction.

[52] In my view, the learned SCJ assessed damages on the basis that in the event the appeal was allowed, that the matter need not be remitted to the sessions court for assessment of damages. Secondly, it was crucial to note that the issue of depositing the sum of MYR317,700.33 with Amanah Raya Bhd was discussed in chambers amongst the parties and the learned SCJ, and hence no reasons were provided by the learned SCJ for issuing such direction. In my view, it was therefore, inequitable for the plaintiff to raise such issue at this stage.

[53] In any event, there was no prejudice suffered by the direction made by the learned SCJ as it was done for the benefit of the plaintiff. On that note, if at all it was an error by the learned SCJ, it was not an appealable one.

CONCLUSION

[54] In conclusion, therefore, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, including the written and oral submissions of all parties, and grounds of judgment of the learned SCJ, this appeal was dismissed, with costs.

Appeal dismissed with costs.

Reported by Dzulqarnain Ab Fatar